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ISONAS, INC.

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10 UNITED STATES DISTRICT COURT
11 CENTRAL DISTRICT OF CALIFORNIA
12 SOUTHERN DIVISION
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15 HID GLOBAL CORPORATION, a
Delaware corporation; ASSA
16 ABLOY AB, a Swedish Limited
Liability Company; and DESTRON
17 FEARING CORPORATION, a
Delaware corporation,

18 Plaintiffs,

19 v.

20 ISONAS, INC., a Colorado
21 corporation; and DOES 1 through
22 10, inclusive,

23 Defendants.
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Case No. SACV 13-1301 JVS (MANx)

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
ISONAS' MOTION TO DISMISS**

FRCP 12(b)(6)

Hearing Date: February 3, 2014

Hearing Time: 1:30 p.m.

Trial Date: Not Set

1 On December, 11, 2013 the Defendant, ISONAS, Inc. (“ISONAS”), was
2 served with a complaint for patent infringement (attached as Exhibit “A”) by the
3 Co-Plaintiffs, Assa Abloy AB, Destron Fearing Corp. and HID Global Corp.
4 (collectively, “Plaintiffs”). ISONAS was named along with ten Doe defendants as
5 infringers of two patents under which the Plaintiffs hold a variety of rights and
6 interests. However, in its allegations of infringement, the Plaintiffs have merely
7 provided bare recitals of the law without allegations of fact that give ISONAS
8 notice of what it must defend against. Even under the liberal notice pleading
9 standards of Fed.R.Civ.P. 8(a)(2) and recent precedent applying that standard to
10 patent infringement claims, the Plaintiffs’ minimal allegations fail to articulate a
11 claim against ISONAS upon which relief may be granted. Moreover, the current
12 allegations fail to provide fair notice to ISONAS of the claims against which it must
13 defend. Therefore, pursuant to Fed.R.Civ.P. 12(b)(6), ISONAS moves to dismiss
14 the Plaintiffs’ complaint with respect to all allegations of infringement of any type
15 asserted against ISONAS.

16 It is not apparent from the Plaintiffs’ infringement allegations which type of
17 infringement codified in 35 U.S.C. §271 is being alleged. The distinctions are
18 material because the pleading requirement is different for direct infringement under
19 §271(a) than it is for induced infringement under §271(b) or contributory
20 infringement under §271(c). However, under any of these infringement theories,
21 Plaintiffs allegations fail to meet the minimum pleading standard.

22 There is no allegation in the Plaintiffs’ complaint that ISONAS is acting
23 alone in any instance of alleged infringement. In all infringement allegations, the
24 Plaintiffs allege that, collectively, the “Defendants” infringe the patents. (Ex. A,
25 Doc. 1 at ¶¶ 18-27). However, the Plaintiffs fail to name ISONAS’ co-defendants,
26 describing them only as Does 1-10. (Ex. A, Doc. 1 at ¶¶ 7-9). Even if the names of
27 the alleged co-defendants are not currently known, the Plaintiffs’ allegations fail to
28 provide any description of who the Doe defendants may be with respect to

1 ISONAS. Further, the complaint does not identify in any way the device that the
 2 Defendants jointly produce or the method the Defendants jointly practice that
 3 infringes either asserted patent. The Plaintiffs' only allegation is that unspecified
 4 "products" are the subject of the infringement claims. (Ex. A, Doc. 1 at ¶¶ 19, 24).
 5 Therefore the complaint does not provide ISONAS with notice of the identity of the
 6 infringers or the nature of the infringing device or method.

7 For a claim of direct infringement under 35 U.S.C. §271(a), a pleading is
 8 sufficient if it conforms to Form 18 in the Appendix of Forms for the Federal Rules
 9 of Civil Procedure. See, *McZeal v. Sprint Nextel Corp.*, 501 F. 3d 1354, 1356-57
 10 (Fed. Cir. 2007)(citing Fed.R.Civ.P. "Form 16" which is the predecessor to the
 11 current Fed.R.Civ.P. Form 18). See also, *In re Bill of Lading Transmission and*
 12 *Processing System Patent Litigation*, 681 F.3d 1323, 1334 (Fed. Cir. 2012). The
 13 Plaintiffs' allegations fail to meet this standard. In Form 18, the model allegations
 14 identify "electric motors" as the subject matter of the infringement claims. But here
 15 the Plaintiffs allege only that "products" made, used offered for sale, sold or
 16 imported collectively by the combined action of ISONAS and Does 1-10 are the
 17 basis for its infringement claims. (Ex. A, Doc. 1 at ¶¶ 19, 24). Notably, the
 18 pleadings state that ISONAS alone makes and sells "RFID readers" and yet the
 19 infringement allegations do not identify these readers as the infringing devices.
 20 (Compare Ex. A, Doc. 1 at ¶¶17 to ¶¶ 18-27). Moreover, there is no allegation
 21 anywhere in the complaint that ISONAS alone infringes any patent. The Plaintiffs'
 22 vague identification of "products" falls short of the minimum standard of Form 18
 23 and fails to "plead facts sufficient to place the alleged infringer on notice as to what
 24 he must defend." *McZeal* at 1357.

25 The failure of the Plaintiffs to provide some identification of the Doe
 26 defendants is similarly fatal to the sufficiency of the pleading, particularly here
 27 where all of the infringement allegations apparently involve the joint action of
 28 ISONAS with the Doe defendants. *Cf. Phonometrics v. Hospitality Franchise*

1 *Systems*, 203 F. 3d 790, 794 (Fed. Cir. 2000)(finding a multi-defendant complaint
2 for patent infringement sufficient where the Plaintiff “names each individual
3 defendant, cites the patent that is allegedly infringed, describes the means by which
4 the defendants allegedly infringe, and points to the specific sections of the patent
5 law invoked.”)

6 If the Plaintiffs contend that the action of ISONAS and Does 1-10 amounts to
7 joint direct infringement of the patents in suit, the pleadings are still deficient. A
8 claim is directly infringed by multiple parties only if “one party exercises ‘control
9 or direction’ over the entire process such that every step is attributable to the
10 controlling party, i.e., the ‘mastermind.’” *Muniauction, Inc. v. Thomson Corp.*, 532
11 F. 3d 1318, 1329 (Fed. Cir. 2008). The Plaintiffs have not alleged that any
12 defendant is the mastermind of a joint infringement effort.

13 If it was the Plaintiffs’ intention not to plead direct infringement under
14 §271(a) but instead to plead a theory of indirect infringement under §271(b) or
15 §271(c), the complaint is still deficient and fails to state a claim upon which relief
16 may be granted. “Indirect infringement requires, as a predicate, a finding that some
17 party amongst the accused actors has committed the entire act of direct
18 infringement.” *BMC Resources, Inc. v. Paymentech, LP*, 498 F. 3d 1373, 1379
19 (Fed. Cir. 2007). “Indirect infringement, whether inducement to infringe or
20 contributory infringement, can only arise in the presence of direct infringement.”
21 *Dynacore Holdings Corp. v. U.S. Philips Corp.*, 363 F.3d 1263, 1272 (Fed. Cir.
22 2004). As shown above, the Plaintiffs’ allegations are inadequate to state a claim
23 for direct infringement. Even if there were no other problems with the Plaintiffs’
24 indirect infringement pleadings, the Plaintiffs’ failure to plead direct infringement
25 also prevents a proper pleading of indirect infringement.

26 Moreover, the standard for pleading indirect infringement is different from
27 the standard for direct infringement. For indirect infringement claims, compliance
28 with Form 18 is not enough. *In re Bill of Lading*, 681 F.3d at 1336-1337 (Fed. Cir.

2012). “To state a claim for contributory infringement ... a plaintiff must ... plead facts that allow an inference that the components sold or offered for sale have no substantial non-infringing uses.” *Id.* at 1337. Here, the Plaintiffs’ complaint makes no such allegation against ISONAS or any other defendant. Similarly, “inducement requires that the alleged infringer knowingly induced infringement and possessed specific intent to encourage another’s infringement.” *DSU Medical Corp. v. JMS Co.*, 471 F.3d 1293, 1306 (Fed. Cir. 2006). In order to survive a motion to dismiss for induced infringement, the Plaintiffs’ allegations must contain facts plausibly showing that the Defendants specifically intended for an underlying direct infringer to infringe the patents in suit and further knew that the underlying infringer’s conduct constituted infringement. *In re Bill of Lading*, 681 F.3d at 1340 (Fed. Cir. 2012).

There are two problems with the Plaintiffs’ pleadings of induced infringement. First, the pleadings do not identify any underlying direct infringer. Since no underlying direct infringer is identified, there is also no allegation of any specific intent by ISONAS for the unidentified party to infringe the patents, nor is there any pleading that ISONAS knew the unidentified party’s conduct constituted infringement. Secondly, the allegations stated by the Plaintiffs are essentially formulaic recitals of the law. While it is true that the Plaintiffs’ complaint must be construed in a light most favorable to the Plaintiffs with reasonable inferences drawn in the Plaintiffs’ favor, the court is “not bound to accept as true a legal conclusion couched as a factual allegation.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed. 2d 868 (2009). Nor is the court required to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences. *Spewell v. Golden State Warriors*, 266 F. 3d 979, 988 (9th Cir. 2001). Here, the Plaintiffs have merely recited statutory language without adding facts specific to ISONAS or the other defendants. For example, 35 U.S.C. §271(a) recites that “whoever without authority makes, uses, offers to sell, or sells

1 any patented invention within the United States or imports into the United States
2 any patented invention” is a direct infringer. The Plaintiffs allege that the
3 Defendants “make, use sell, offer for sale, and/or import into the United States
4 products that” allegedly infringe. This is a formulaic recital of the law and therefore
5 is not the type of allegation the court must accept as true.

6 ISONAS does not take lightly the filing of this motion or the burden it must
7 sustain to prevail. Federal Rule of Civil Procedure 8(a)(2) requires only "a short and
8 plain statement of the claim showing that the pleader is entitled to relief," in order
9 to "give the defendant fair notice of what the . . . claim is and the grounds upon
10 which it rests." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555, 127 S.Ct. 1955,
11 167 L.Ed.2d 929 (2007). However, the Plaintiffs’ allegations against ISONAS in
12 this case fail to meet that standard. As a result, the pleadings do not fairly inform
13 ISONAS of the basis for the Plaintiffs’ complaint. ISONAS cannot tell or
14 reasonably discern from the pleadings what technology stands accused of infringing
15 the asserted patents. It cannot tell who its unidentified codefendants are, nor can it
16 tell what joint conduct of the defendants amounts to the infringement alleged by the
17 Plaintiffs. ISONAS cannot tell whether the infringement alleged against it is direct
18 infringement or some form of indirect infringement or some form of joint
19 infringement. ISONAS cannot tell whether additional parties should be joined or
20 impleaded. ISONAS cannot tell whether it has or owes indemnification to any other
21 party. ISONAS cannot tell whether venue is proper for all defendants. ISONAS
22 cannot determine what discovery it may need or what information may be relevant
23 to its defenses. As a result of the Plaintiffs’ fundamental failure to provide fair
24 notice with its pleading of infringement, ISONAS cannot discern which defenses
25 are available to it.

26 For all the reasons set forth above, the Plaintiffs’ claims of infringement
27 against ISONAS should be dismissed for failure to properly state a claim upon
28 which relief could be granted.

1 Further, since ISONAS seeks to dismiss all of the Plaintiffs' claims against
2 ISONAS, it also requests that the Rule 16(b) scheduling conference currently set for
3 January 13, 2014, and the related filing of a Joint Rule 26(f) Report on January 6,
4 2014 be cancelled pending a ruling on its motion to dismiss.

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7 Dated: January 2, 2014

LATHROP & GAGE LLP

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9 By: /s/ Jeff Grant

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11 Jeffrey H. Grant
12 Attorneys for Defendant
13 ISONAS, INC.
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MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF
ISONAS' RULE 12(B)(6) MOTION TO DISMISS